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NO. 82-2157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT INC., et. al.,
Respondents.

CENTRAL STATES' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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NOW COME Petitioners, the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, and, pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, file this Supplemental Brief in Support of their Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

I. Recent decisions and other intervening matter support Petitioners' contention that fund trustees must conduct complete and independent audits of employers' records and that reliance on the efforts of unions or participants themselves is misplaced.

Introduction

Succinctly put, the basic issue before the Court in this Petition is whether allegations of confidentiality suffice to limit access to tax and payroll records where trustees of

employee benefit funds seek to conduct random general audits of contributing employers' records in order to verify the accuracy of reporting, to safeguard the benefits of all eligible plan participants, and to protect the actuarial solvency of the Funds, *and* where specific safeguards are offered to protect the confidentiality of records. The Sixth Circuit limited the scope of a permissible random audit to the records of employees whom the *employer* conceded were covered by the collective bargaining agreement unless the Trustees had reasonable cause to believe particular individuals were wrongly or at least questionably excluded from coverage.[1]

In so concluding, the court believed that the efforts of unions and of employees themselves could adequately safeguard the Funds. Not surprisingly, Central Transport in its Brief in Opposition states at page 4:

> The Union has always vigorously and effectively insured that all employees performing work under the collective bargaining agreements receive all employee benefits to which they are entitled, including contributions to the Funds.

This assertion falls of its own weight in light of some recently decided cases as well as other intervening matter

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[1] Respondents' have raised what appears to be a new issue in their "Question Presented." There is nothing in the record or the decisions below indicating that the Trustees demanded to audit records for employees whom the *Union already determined were not covered by the collective bargaining agreement*. Such an issue was not before the Court. The *employer* claimed that 60% of its employees were not covered and refused to produce records for these persons (Petition, p. 4). Respondent's phrasing of the "Question Presented" serves only to exaggerate Central Transport's claims of confidentiality. Central Transport's "Question Presented" also implies that the Funds are "maintained for Union workers." The Court of Appeals, in setting forth its statement of facts, explicitly noted that union membership was *not* a prerequisite for coverage and hence *not* a prerequisite for contributions and benefits (*see* Petition, A-16). To characterize Petitioners as Funds created and administered *only* for union workers similarly distorts the issue and magnifies Central Transport's confidentiality defense.

that has come to light subsequent to the filing of the Petition on July 2, 1983.

a) New intervening matter

On July 6, 1983, a by-lined report appeared on the front page of the New York Times, reprinted herein as Appendix A, which confirms the need for independent and complete trustee audits of contributing employers' records. According to the report, executives of certain construction companies in the dry-wall industry of metropolitan New York allegedly conspired to withhold from a carpenters' union welfare fund "more than $10 million over a four year period." This was allegedly effected through a scheme of "making 'off the books' or concealed payments in cash to employees" in lieu of regular wages recorded for tax purposes. Investigation thus far has suggested that some of the companies may have engaged in these "illegal practices with the knowledge and approval of some carpenters union officials from 1978 to 1981."

In their Petition, Central States noted that the purpose of comparing *complete payroll records with IRS 941 forms* at the initial stage of an audit was necessary precisely in order to uncover cash disbursements or hidden payments (*see* Petition, pp. 6, 9). The Sixth Circuit ruling forbids such a comparison.

Clearly, to the extent that fund trustees are precluded from examining tax and payroll records and from conducting comprehensive audits, situations such as that described in the New York Times article are more likely to occur. Conversely, it is clear that the financial solvency of employee benefit funds cannot be allowed to depend on random investigations undertaken by the IRS, the Justice Department, or the F.B.I. Moreover, the relevance of particular records for the audit purpose requested should not depend on who requests their production.

b) New cases

As observed in the *Petition* (pp. 12-16), the interests of unions and employee benefit funds do not necessarily coincide, often for quite legitimate reasons.[2] Sometimes, however, unions or their representatives fail to protect both the interests of funds and the interests of individual bargaining unit members either by acts of omission[3] or for meritricious reasons. An example of the latter is *U.S.* v. *Russo*, 708 F.2d 209 (6th Cir. 1983, reported subsequent to the filing of the Petition). Here, the Court of Appeals for the Sixth Circuit affirmed the conviction of two employers *and a local business agent* for conspiracy to violate the Hobbs Act (18 U.S.C. § 1951) and for an actual violation of the statute. The conduct underlying the conviction was the use of threats to compel owner-operators to relinquish a percentage of their earnings to cover contributions to the Central States Pension and Health and Welfare Funds which the *company* was required to pay on their behalf under the National Master Freight Agreement (the same collective bargaining agreement to which Central Transport is signatory!). The contract explicitly prohibits employers from making such deductions from owner-operators' earnings which have the effect of forcing these employees to make their own fringe benefit contributions. This case raises the implication that employees might sometimes find it difficult to protect their own interests in the event a representative of the union fails to act on their behalf (*see* Petition, p. 15).

Another aspect of the problem is revealed in *Kemmis* v. *McGoldrick*, 706 F.2d 993 (9th Cir., May 24, 1983, reported June 27, 1983 and hence after the Petition was printed). Here, the Court of Appeals for the Ninth Circuit found

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[2] *See Robbins* v. *Prosser's Moving and Storage Co.*, 700 F.2d 433 (8th Cir. *en banc*, 1983, Petitions for Certiorari filed May 17, 1983, Nos. 82-1860 and 82-1862, cited in Petition."

[3] *See U.S.* v. *S & Vee Cartage*, 704 F.2d 914 (6th Cir., April, 1983, cited in Petition).

itself compelled to disallow a side-agreement between a union and an employer or an oral modification of a collective bargaining agreement which, if allowed to stand, would have had the effect of prejudicing the third-party beneficiary trust fund in question although the particular employee involved would still have received his benefits. The employee in that case was a full-time salaried union employee who was engaged in "split-work," e.g., work that was partly covered by the collective bargaining agreement and partly outside the contract. The employer had executed a short form agreement incorporating a Master Survey Agreement by reference. Under the master agreement, as interpreted, employers were required to contribute for *all hours worked* by employees who perform *any* work covered by the contract. In the case of full-time, salaried employees, contributions were required based on a 40-hour week. The trustees of the fund had sent notices to all employers explaining contribution requirements under this contract. Nevertheless, the employer and the local orally agreed that the employer would pay only on "the minimum hours necessary for his employee to maintain eligibility benefits." McGoldrick reported and contributed based only on 200 hours per calendar quarter. The trustees filed suit for delinquent contributions. The district court found for the employer based on the oral understanding. The court of appeals reversed.

To the extent the Court of Appeals for the Sixth Circuit predicated its ruling on the assumption that unions can be adequately relied upon to protect the interests of employee benefit funds as well as those of their constituency and that employees can and should be relied on to protect their own interests, the New York Times article and the cases discussed above tend to suggest the opposite.

II. The concept "concededly covered employees" is unworkable in practice and logically untenable.

In their *Amicus* Brief, the National Coordinating Committee for Multiemployer Plans (NCCMP) made reference to

two recent cases: *McNeff* v. *Todd*, 103 S. Ct. 1753 (1983) and *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983). In both these cases, audits resulting in obligations the respective courts enforced could not have taken place under the *Central Transport* ruling since the employers asserted in both instances that certain employees were *not* covered by the contracts in question.

A similar situation is revealed in *Laborers Health and Welfare Trust* v. *Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983, reported after the filing of the Petition). Here, a coverage dispute in a trustee collection action arose subsequent to a fund audit. The audit revealed and the trustees claimed $131,887.68 in unpaid pension contributions on behalf of a class of unskilled employees performing "callback work." The employer contended that "callback work" was not within the union's jurisdiction and that the employees performing it were not covered by the collective bargaining agreement. The district court granted the employer's motion for summary judgment. The court of appeals reversed and remanded for trial on the work coverage issue. But for the audit, the trust fund in question would not have discovered that "the Company used nonunion labor for 'call-back work' and that no pension contributions were made for such labor." In accordance with *Central Transport*, however, this audit, too, could not have been conducted, which would have precluded the trustees from attempting to collect amounts it contended the employer rightfully owed the funds.

These three cases illustrate the impracticability of placing the scope of a Fund audit in an employer's hands.

CONCLUSION

In *Fusari* v. *Steinberg*, 419 U.S. 379, 391, Chief Justice Burger wrote in his concurring opinion: "This Court must rely on counsel to present issues fully and fairly, and counsel have a continuing duty to inform the Court of *any*

development which may *conceivably* affect an outcome" (emphasis supplied). In *Fusari*, counsel had neglected to inform the Court of a change in state law which might have rendered certain due process challenges moot. Chief Justice Burger, however, did not limit the informational duty of counsel to events of such magnitude as legislative changes. Petitioners submit that the New York Times article and the three new cases discussed above can be regarded as "developments" which could "conceivably affect the outcome" of the Court's decision to grant their Petition. It is in this spirit that the present Brief is filed.

Respectfully submitted,

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